

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENT M. BRYAN,

Plaintiff,

v.

TAHOE REGIONAL PLANNING
AGENCY, et al.,

Defendants.

No. 2:21-cv-2340 TLN AC PS

ORDER and

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding in this action pro se and the case was accordingly referred to the undersigned by Local Rule 302(c)(21). Following an initial scheduling hearing that took place on June 29, 2022 (ECF No. 13), defendants moved for partial judgment on the pleadings and partial summary judgment, such that all claims will be resolved. ECF No. 15. Defendants filed their memorandum at ECF No. 16 and a request for judicial notice at ECF No. 17. Plaintiff opposes the motion. ECF No. 22. Defendants replied and submitted a supplemental request for judicial notice. ECF Nos. 20, 21.¹ Plaintiff filed a surreply (ECF No. 23) to which defendants object (ECF No. 24). The court, in its discretion, considers the surreply in an effort to ensure all arguments are fully considered.

¹ The court recognizes that the docket numbers are not in proper ascending sequence.

As a preliminary matter, the court notes defendants made a supplemental motion for judicial notice of public records, labeled “Relevant portions of TRPA Application MOOR2009-3449.” ECF No. 21. “Judicial notice is appropriate for records and reports of administrative bodies.” United States v. 14.02 Acres of Land More or Less in Fresno County, 546F3d 943, 955 (9th Cir. 2008) (internal quotation marks omitted). The documents for which defendants seek judicial notice are public records, further authenticated by the declaration of Katherine Huston, a Paralegal at Tahoe Regional Planning Agency and a person with knowledge of the documents. ECF No. 21-1. For these reasons, the motion for judicial notice (ECF No. 21) is GRANTED.

I. Complaint and Procedural Background

Plaintiff sues the Tahoe Regional Planning Agency (“TRPA”), along with 19 individual defendants professionally associated with TRPA, in this action claiming violations of plaintiff’s Fifth and Fourteenth Amendment Rights pursuant to 42 U.S.C. § 1983, as well as violations of 36 C.F.R. § 327.20 (Unauthorized Structures), 22 C.F.R. § 3300.3(b) (Activities occurring before certain dates), Section 10 of the US Harbors and Rivers Act (33 U.S.C. § 403), and the Tahoe Regional Planning Agency Code of Ordinances and Rules of Procedures. ECF No. 1 at 1-3, 9-14.

TRPA now seeks judgment on the pleadings on plaintiff’s civil rights claims pursuant to Fed. R. Civ. P. 12(c). TRPA contends these claims are defective as a matter of law, primarily because plaintiff lacks sufficient interest in a buoy located on California state lands. ECF No. 16 at 7. TRPA also seeks summary judgment, pursuant to Fed. R. Civ. P. 56, on the record-based claims that TRPA abused its discretion when it denied plaintiff’s application for a buoy.

II. Applicable Legal Standards

A. Judgment on the Pleadings/Judicial Review of Agency Decision

Under Federal Rule of Civil Procedure 12(c), “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). In a 12(c) motion, the court “assume[s] that the facts that [plaintiff] alleges are true.” Jackson v. Barnes, 749 F.3d 755, 763 (9th Cir. 2014) (citing United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., 637 F.3d 1047, 1053 (9th Cir. 2011)). “Judgment on the pleadings is properly granted when [, accepting all factual allegations in the complaint as true,] there is no

1 issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.”
2 Chavez v. United States, 683 F.3d 1102, 1108–09 (9th Cir. 2012) (quoting Fleming v. Pickard,
3 581 F.3d 922, 925 (9th Cir. 2009)).

4 Judicial review of a final TRPA decision on a permit is provided for in Article VI(j) of the
5 bi-state Tahoe Regional Planning Compact (“Compact”). Under Article VI(j)(5), the Court’s
6 review is limited to determining whether TRPA’s decision “was supported by substantial
7 evidence and is otherwise in accordance with the law.” S&M Inv. Co. v. Tahoe Regional
8 Planning Agency, 702 F. Supp. 1471, 1472 (E.D. Cal. 1988). Article VI(j)(5) of the Compact
9 provides in relevant part:

10 In any legal action filed pursuant to this subdivision which
11 challenges an adjudicatory act or decision of the Agency to approve
12 or disapprove a project, the scope of judicial inquiry shall extend
13 only to whether there was prejudicial abuse of discretion. Prejudicial
14 abuse of discretion is established if the Agency has not proceeded in
15 a manner reburied by law or if the act or decision of the Agency was
not supported by substantial evidence in light of the whole record. In
making such determination, the court shall not exercise its
independent judgment on evidence, but shall only determine whether
the act or decision was supported by substantial evidence in light of
the whole record.

16 Request for Judicial Notice, Exhibit B. Substantial evidence has been defined as such evidence
17 “as a reasonable mind might accept as adequate to support a conclusion.” Berroteran–Melendez
18 v. I.N.S., 955 F.2d 1251, 1255–1256 (9th Cir.1992). Moreover, the substantial evidence standard
19 of review must be “searching and careful,” subjecting the agency’s decision to close judicial
20 scrutiny. Containerfreight Corp. v. U.S., 752 F.2d 419, 422 (9th Cir.1985).

21 B. Summary Judgment

22 Summary judgment is appropriate when the moving party “shows that there is no genuine
23 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
24 Civ. P. 56(a). Under summary judgment practice, “[t]he moving party initially bears the burden
25 of proving the absence of a genuine issue of material fact.” In re Oracle Corp. Sec. Litig., 627
26 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The
27 moving party may accomplish this by “citing to particular parts of materials in the record,
28 including depositions, documents, electronically stored information, affidavits or declarations,

1 stipulations (including those made for purposes of the motion only), admissions, interrogatory
2 answers, or other materials” or by showing that such materials “do not establish the absence or
3 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
4 support the fact.” Fed. R. Civ. P. 56(c)(1).

5 Summary judgment should be entered, “after adequate time for discovery and upon
6 motion, against a party who fails to make a showing sufficient to establish the existence of an
7 element essential to that party’s case, and on which that party will bear the burden of proof at
8 trial.” Celotex, 477 U.S. at 322. In such a circumstance, summary judgment should “be granted
9 so long as whatever is before the district court demonstrates that the standard for the entry of
10 summary judgment, as set forth in Rule 56(c), is satisfied.” Id.

11 If the moving party meets its initial responsibility, the burden then shifts to the opposing
12 party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec.
13 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In attempting to establish the
14 existence of this factual dispute, the opposing party may not rely upon the allegations or denials
15 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or
16 admissible discovery material, in support of its contention that the dispute exists. See Fed. R.
17 Civ. P. 56(c). The opposing party must demonstrate that the fact in contention is material, i.e., a
18 fact “that might affect the outcome of the suit under the governing law,” Anderson v. Liberty
19 Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n, 809
20 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., “the evidence is such that a
21 reasonable jury could return a verdict for the nonmoving party,” Anderson, 477 U.S. at 248.
22 In the endeavor to establish the existence of a factual dispute, the opposing party need not
23 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed
24 factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the
25 truth at trial.” T.W. Elec. Service, Inc., 809 F.2d at 630 (quoting First Nat’l Bank of Ariz. v.
26 Cities Serv. Co., 391 U.S. 253, 288-89 (1968)). Thus, the “purpose of summary judgment is to
27 pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
28 trial.” Matsushita, 475 U.S. at 587 (citation and internal quotation marks omitted).

1 “In evaluating the evidence to determine whether there is a genuine issue of fact, [the
 2 court] draw[s] all inferences supported by the evidence in favor of the non-moving party.” Walls
 3 v. Cent. Costa County Transit Auth., 653 F.3d 963, 966 (9th Cir. 2011) (citation omitted). It is
 4 the opposing party’s obligation to produce a factual predicate from which the inference may be
 5 drawn. See Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to
 6 demonstrate a genuine issue, the opposing party “must do more than simply show that there is
 7 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586 (citations
 8 omitted). “Where the record taken as a whole could not lead a rational trier of fact to find for the
 9 non-moving party, there is no ‘genuine issue for trial.’” Id. at 587 (quoting First Nat’l Bank, 391
 10 U.S. at 289).

11 III. Statement of Undisputed Facts

12 Unless otherwise specified, the following facts are either expressly undisputed by the
 13 parties or have been determined by the court, upon a full review of the record, to be undisputed
 14 by competent evidence. This case involves an agency administrative record (“AR”), which is
 15 filed in three volumes at ECF No. 8-1 (AR I), 8-2 (AR II), and 8-3 (AR III). It is fully described
 16 an authenticated by the Tahoe Regional Planning Agency at ECF No. 8. Defendants’ statement
 17 of undisputed facts is located at ECF No. 26; plaintiff’s statement is located at ECF No. 27.

18 Plaintiff Kent Bryan claims ownership of a non-littoral (i.e., non-shoreline) parcel of
 19 property located at 4100 Doe Ave. in Placer County. AR I at 8. On October 13, 2009, plaintiff
 20 applied for a TRPA Mooring Permit for a buoy anchored in the West Shore of Lake Tahoe. AR I
 21 at 1-5. On February 26, 2010, TRPA staff requested additional information to support plaintiff’s
 22 permit application. AR I at 6. Plaintiff provided a letter from the U.S. Army Corps of Engineers
 23 (“USACE”) dated October 7, 2009, stating that the buy in question had been in place in Lake
 24 Tahoe since 1968. AR I at 7. Plaintiff’s application was not immediately processed because
 25 TRPA was in the process of revising its 2008 Shoreline Plan, which was previously invalidated
 26 by this court. ECF No. 27 at 2-3.

27 On October 24, 2018, TRPA adopted its revised Shoreline Plan, which became effective
 28 on December 23, 2019. ECF No. 17-1. In April of 2019 TRPA opened the application process

1 for existing buoys, Phase 1. ECF No. 17-3 at Ch. 2.B. Under the 2018 Shoreline Plan, a non-
 2 littoral parcel owner may be entitled to a mooring buoy permit if: (i) the non-littoral parcel owner
 3 provides clear evidence of the existence of the buoy prior to February 10, 1972; and (ii) the non-
 4 littoral parcel owner provides a valid authorization from the federal or state agency with
 5 jurisdiction at Lake Tahoe. AR I at 14, TRPA Code of Ordinances § 84.3.3.D.3.b.

6 On January 13, 2020, plaintiff submitted, as a non-littoral parcel owner, an application for
 7 a TRPA Mooring Permit for a buoy anchored in West Shore Lake Tahoe. AR I at 8-12. To
 8 support his application, plaintiff provided the USACE letter dated October 7, 2009, which states
 9 that the buoy in question has been in place since 1968. AR I at 7, AR III 42-424. On February
 10 25, 2021, TRPA’s Executive Director denied the buoy permit application via a letter asserting
 11 that the USACE letter did not constitute “valid authorization from an applicable federal or state
 12 agency with jurisdiction at lake Tahoe” as required by the TRPA Code of Ordinances. AR I at
 13 14. On March 11, 2021, plaintiff timely appealed the denial of his application. AR I at 15-23.
 14 The issue on appeal was whether plaintiff’s application met the second prong of the TRPA Code
 15 § 84.3.3.D.3.B – whether the USACE letter “provides a valid authorization from an applicable
 16 federal or state agency with jurisdiction at lake Tahoe.” AR I at 37-38. The TRPA staff report
 17 concluded that the first prong was met through evidence in the form of the USACE letter showing
 18 the buoy had been in existence since 1968. AR I at 38. However, TRPA staff concluded that the
 19 second prong — requiring the non-littoral parcel owner to provide a valid authorization from the
 20 federal or state agency with jurisdiction at Lake Tahoe — was not met.

21 The TRPA letter states, on that point, as follows:

22 The main issue involved in this appeal is whether the 2009 U.S.
 23 Army Corps of Engineers’ letter constitutes “valid authorization” for
 24 Mr. Bryan’s claimed buoy. According to the Corps, the 2009 Corps
 25 grandfathering letter is not authorization for a specific person or
 26 property owner to place a buoy in Lake Tahoe. See May 18, 2021
 27 email for U.S. Corp of Engineers (attachment D). Moreover, the
 28 Corps letter does not provide the necessary association between Mr.
 Bryan’s non-littoral parcel and the claim buoy, it simply recognizes
 that a buoy has existed since before 1972. Since the letter only
 confirms a buoy existed prior to that date and the letter can be issued
 to any party or property that requested the grandfather determination
 regardless of actual ownership, the Corps’ “grandfather” letters
 simply duplicate the requirements of Code section 84.3.3.D.3.b(i),

1 rather than provide the additional personal authorization required by
2 Code section 84.3.3.D.3.b(ii). As a result, Mr. Bryan has not met his
burden and his appeal should be denied.

3 AR I at 38.

4 In an email to Matthew Miller and Tiffany Good from TRPA regarding USACE
5 grandfathering decisions dated May 18, 2021, Jennifer Thompson, whose e-mail signature reads
6 “Senior Project Manager” for the Nevada-Utah Regulatory Section of the USCAE, wrote as
7 follows regarding the impact of a USCAE grandfather determination:

8 Per our conversation, a grandfather determination means that the
9 STRUCTURE(S) is/are authorized by the Corps because the
structure(s) existed prior to December 18, 1968 per 33 CFR §
10 330.3(b) (<https://www.law.cornell.edu/cfr/text/33/330.3>). A
11 grandfather determination does not and cannot make any assignment
or transfer of ownership for a grandfathered structure, it simply
12 represents the Corps’ determination that the activity was commenced
or completed prior to December 18, 1968 and therefore does not
13 require further permitting from the Corps under Section 10 of the
Rivers and Harbors Act of 1899 (33 U.S.C. § 403).

14 AR I at 56.

15 The TRPA Legal Committee considered plaintiff’s appeal on May 24, 2021, and the
16 Board voted to remand to Staff for validation of ownership proof the buoy in question. AR I at
17 191. On June 14, 2021, plaintiff submitted a statement to TRPA regarding ownership and control
18 of the buoy in question. AR II at 196-222. The submission included (1) email correspondence
19 with USACE wherein USACE requested plaintiff’s grant deed and tax bill; (2) email
20 correspondence with the County Sherriff documenting theft and/or vandalism of the buoy; (3)
21 email correspondence regarding theft and vandalism of other “Tall Pines” buoy owners; (4)
22 receipts for maintenance of the buoy; and (4) a thank you letter from a person who used the buoy
23 in question for a portion of a season. AR II 198-222. On August 13, 2021, TRPA staff
24 responded after remand and again denied the permit application. AR II at 223.

25 TRPA’s second denial letter stated that TRPA staff could find no evidence demonstrating
26 that plaintiff, or a predecessor in interest, received authorization to place the buoy or that it
27 continues to be legally associated with plaintiff’s non-littoral parcel, and concluded that the
28 second grandfather prong was not satisfied. AR II at 223. On August 16, 2021, Bryan timely

1 appealed the second denial. AR II at 224. The issue on appeal was again whether the USACE
 2 Letter constitutes “valid authorization” for plaintiff’s claim to the buoy in question under the
 3 TRPA code. AR II at 227. On October 27, 2021, the TRPA legal committee considered the
 4 appeal and voted to recommend denial of the appeal to the Governing Board. AR II at 337. Later
 5 the same day, the Board denied the appeal. AR II at 368.

6 IV. Analysis

7 A. Defendants are Entitled to Judgment on Plaintiff’s Takings Claim

8 Plaintiff claims TRPA’s denial of his buoy application “violated the Constitution of the
 9 United States by taking the Plaintiff’s property.” ECF No. 1 at 15. The Takings Clause of the
 10 Fifth Amendment prohibits the government from taking “private property” “for public use,
 11 without just compensation.” U.S. Const., amend. V. “A Takings Clause claim requires proof
 12 that the plaintiff possesses a ‘property interest’ that is constitutionally protected.” Sierra Med.
 13 Servs. All. v. Kent, 883 F.3d 1216, 1223 (9th Cir. 2018) (internal citations omitted). “Only if he
 14 does indeed possess such an interest will a reviewing court proceed to determine whether the
 15 expropriation of that interest constitutes a ‘taking’ within the meaning of the Fifth Amendment.”
 16 Schneider v. Cal. Dep’t of Corr., 151 F.3d 1194, 1198 (9th Cir.1998).

17 “In some instances, a person can have a constitutionally protected property interest in a
 18 government benefit, such as a license or permit.” Gerhart v. Lake County, Mont., 637 F.3d 1013,
 19 1019 (9th Cir. 2011). To a property interest in a license or permit, a plaintiff must demonstrate
 20 more than a need, desire, or unilateral expectation; he must show an “entitlement” to the benefit,
 21 and a property interest that stems from an independent source such as state law or certain
 22 rules/understandings that support claims of entitlement to the benefit at issue. Id. “The Supreme
 23 Court has explained, ‘[a] constitutional entitlement cannot be created—as if by estoppel—merely
 24 because a wholly and expressly discretionary state privilege has been granted generously in the
 25 past.’” Id. (quoting Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

26 In this case, plaintiff has no cognizable property interest in his application to locate a buoy
 27 on lands belonging to the State of California. Upon entering statehood, California gained title to
 28 the bed of Lake Tahoe within its boundaries from the United States. State of California v.

1 Superior Ct. (Lyon), 29 Cal. 3d 210, 222 (1981). Plaintiff, who is seeking a permit for a buoy on
 2 state property, does not have a “legitimate claim of entitlement” to a buoy permit and therefore
 3 lacks a property interest to be “taken” by the denial of that application. The USACE Letter
 4 confirms only that a buoy has existed in its current location since 1968. AR I:7. The TRPA
 5 denied the permit based on the lack of evidence linking plaintiff’s lot on Doe Avenue to the buoy
 6 in question, and there is no evidence of a lease or other approval from the appropriate agencies.
 7 Plaintiff thus has no recognizable interest in the existing buoy’s location. Though he rests his
 8 takings claim on his interest in the location of the pre-existing buoy, the fact that some form of
 9 permission may have previously been granted to place the buoy does not create an entitlement to
 10 a permit. Conn. Bd. of Pardons, 452 U.S. at 465. The State of California informed plaintiff that
 11 his unpermitted buoy is trespassing on state lands because he has not been issued a lease from the
 12 California State Lands Commission. See AR III:0422-0424. Per California law, plaintiff’s
 13 trespass can never ripen into a property interest. See Cal. Civil Code § 1007. Because plaintiff
 14 does not have an entitlement to a permit on State-owned land, he cannot succeed on a Takings
 15 claim under the Fifth Amendment. Judgement should be entered in favor of defendants on this
 16 claim.

17 B. Defendants are Entitled to Judgment on Plaintiff’s Equal Protection Claim

18 Plaintiff also asserts that is Fourteenth Amendment right to Equal Protection was violated
 19 by defendants. The Fourteenth Amendment provides that “[n]o state shall ... deny to any person
 20 within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Bryan’s
 21 complaint alleges that TRPA violated the equal protection clause because “[t]he defendant is not
 22 treating all applicants equally.” ECF No. 1 at 15.

23 The purpose of the equal protection clause is to protect against “intentional and arbitrary
 24 discrimination.” Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923) (quoting
 25 Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352 (1918)). To establish an
 26 equal protection violation, a plaintiff must demonstrate that he is either a member of a protected
 27 class or a “class of one,” and that he was treated differently than others who are similarly situated
 28 without any rational basis for the difference in treatment. Village of Willowbrook v. Olech, 528

1 U.S. 562, 563 (2000). Where the alleged discrimination is not based on plaintiff's membership in
 2 a protected class (e.g., race discrimination), "rational basis" review applies. Nordlinger v. Hahn,
 3 505 U.S. 1, 10 (1992). Rational basis review requires that "there is a rational relationship
 4 between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe by
 5 Doe, 509 U.S. 312, 320 (1993). "The government doesn't have to articulate the purpose of its
 6 policy or the reasons for its classifications. Instead, the party raising an equal protection
 7 challenge must negate 'every conceivable basis which might support it.'" United States v. Ayala-
 8 Bello, 995 F.3d 710, 715 (9th Cir.) (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315
 9 (1993)), cert. denied, 142 S. Ct. 513 (2021).

10 To bring a "class of one" equal protection claim, a plaintiff allege facts supporting three
 11 elements: that the defendants "(1) intentionally (2) treated [plaintiff] differently than other
 12 similarly situated [mine operators], (3) without a rational basis." Gerhart v. Lake County, Mont.,
 13 637 F.3d 1013, 1022 (9th Cir. 2011). "[A]s to the different treatment element, a plaintiff must
 14 demonstrate that the level of similarity between plaintiff and the persons with whom [plaintiff]
 15 compare[s] [herself] [is] extremely high." Hamer v. El Dorado County, No. 08-2669, 2011 WL
 16 794895, at 12 (E.D.Cal. Mar. 1, 2011) (citation and internal quotation marks omitted). Equal
 17 protection is intended to prevent disparate treatment of those "whose situations are arguably
 18 indistinguishable." Ross v. Moffitt, 417 U.S. 600, 609 (1974). "Where a plaintiff is making a
 19 class-of-one claim, the essence of the claim is that only the plaintiff has been discriminated
 20 against, and therefore the basis for the differential treatment might well have been because the
 21 plaintiff was unique; thus, there is a higher premium for a plaintiff to identify how he or she is
 22 similarly situated to others." Scocca v. Smith, No. C-11-1318 EMC, 2012 WL 2375203, at 5
 23 (N.D. Cal. June 22, 2012).

24 In the present case, the complaint itself does not identify any other applicants to whom
 25 plaintiff is similarly situated. In his opposition to defendants' motion, plaintiff argues that there
 26 are "two other Tahoe Pines residents that have received permits for non-littoral buoys that are
 27 similarly situated to plaintiff." ECF No. 22 at 12. One of the permits plaintiff attaches is not for
 28 a buoy but for a pier, and the applicant is listed as the Tahoe Pines Homeowners Association, not

1 an individual resident. ECF No. 22 at 32. The other document is a “Notice of Exemption” for
 2 buoys by property owners identified as the O’Neill trust. Id. at 28. However in their
 3 supplemental request for judicial notice, defendants submit evidence that the O’Neill permit
 4 application varied in important ways from plaintiff’s application.

5 Specifically, unlike plaintiff’s application, the O’Neill application was submitted as
 6 littoral lot on Lake Tahoe. ECF No. 21-1 at 8-9. Also unlike plaintiff, the O’Neill’s hold a lease
 7 from the California State Land Commission for their two buoys. Id. at 16-21. Further, unlike
 8 plaintiff, TRPA considered the O’Neill application under a different set of shorezone ordinances
 9 in effect in 2010 rather than the 2018 Shoreline Plan. Id. at 1. These differences establish why
 10 TRPA granted the O’Neill a permit for their buoys. Plaintiff fails to allege any similarly situated
 11 applicant (i.e., a non-littoral property owner without a specific authorization and relying upon a
 12 USACE grandfathering letter who was granted a buoy permit under the 2018 Shoreline Plan) who
 13 was treated differently. TRPA is thus entitled to judgment on the pleadings on the equal
 14 protection claim.

15 C. Judgment in Favor of Individual Defendants is Appropriate

16 Plaintiff sued TRPA Governing Board and staff members individually without any
 17 allegations that these individuals acted outside of their official capacities, and without alleging
 18 any specific facts tied to any individuals. ECF No. No. 1 at 2-14. TRPA sought judgment on the
 19 pleadings for all members in their individually capacity on several grounds, including qualified
 20 immunity, personal jurisdiction, and quasi-judicial immunity. Motion at 11-13. Plaintiff failed
 21 respond to or address any of these grounds in his Opposition. In an unauthorized surrply, which
 22 the court considers in light of plaintiff’s pro se status, plaintiff “emphasizes they have moved the
 23 Court for discovery and that the Defendants actions outside of their official capacities cannot be
 24 determined at this juncture.” ECF No. 23 at 2. This is not sufficient to defeat the motion.

25 A complaint alleging claims against individual defendants under § 1983 must allege in
 26 specific terms how each named defendant is involved. Arnold v. Int’l Bus. Machs. Corp., 637
 27 F.2d 1350, 1355 (9th Cir. 1981). There can be no liability under 42 U.S.C. 1983 unless there is
 28 some affirmative link or connection between a defendant’s actions and the claimed deprivation.

1 Id. It is not enough for plaintiff to state, in defense to a motion for summary judgment, that it is
 2 possible discovery will reveal a claim. Plaintiff has not alleged any specific action taken by any
 3 specific defendant; he has not even identified what he thinks he might find by conducting
 4 discovery. Judgment in favor of defendants is appropriate under these circumstances.

5 D. Defendants are Entitled to Judgment on Plaintiff's Administrative Review Claim

6 Plaintiff alleges that TRPA erred in denying his permit application because it incorrectly
 7 interpreted the second prong of Code section 84.3.3.D.3.b. Plaintiff argued to TRPA's
 8 Governing Board that the USACE Letter was "valid authorization," but the Governing Board,
 9 after briefing from TRPA staff and the Legal Committee, determined that the USACE Letter did
 10 not meet the definition of "valid authorization." AR II:365.

11 The Code provides that a permit may be issued for one buoy associated with a non-littoral
 12 parcel where two things are shown: (1) that the buoy existed before 1972, and (2) that the buoy
 13 has a valid authorization from an applicable state or federal agency. The record shows that TRPA
 14 interpreted "valid authorization" to involve an authorization showing ownership of the buoy by
 15 the parcel owner/applicant. AR II:228 and 366. TRPA's interpretation of the Code provision is
 16 subject to wide deference. An agency's interpretation of its own regulation is "controlling unless
 17 it is 'plainly erroneous or inconsistent with the regulation.'" Auer v. Robbins, 519 U.S. 452, 461
 18 (1997); Public Lands for People v. Dept. of Agriculture, 697 F.3d 1192, 1199 (9th Cir. 2012);
 19 Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006).

20 Here, the record shows that the USACE Letter confirmed that a buoy existed in the
 21 location of the buoy in question as of 1968. AR I:7. However, the TRPA determined that the
 22 letter was not evidence of ownership related to plaintiff's non-littoral parcel. After the permit
 23 application was denied by TRPA's Executive Director on February 25, 2021, the Governing
 24 Board granted plaintiff's appeal to allow him another opportunity to prove his ownership of the
 25 buoy. AR II:189, 227. Both plaintiff and TRPA agreed that plaintiff had (1) claimed ownership
 26 of his parcel and (2) established that the buoy had been in the lake for a long time. However,
 27 TRPA determined that there was no evidence of authorization by an agency for the placement of
 28 the buoy by the parcel owner. AR II:189. The USACE Letter in the record showed that the buoy

1 had been in place since before 1972, but the letter could have been issued to any party or property
2 that requested the determination. AR II:228.

3 TRPA interpreted the second prong of Code section 84.3.3.D.3.b to require “non-littoral
4 property owners to show that they are, in fact, entitled to a mooring that was present before 1972
5 and that they received permission to anchor from an applicable state or federal agency with
6 jurisdiction at Lake Tahoe.” AR II:228. As noted in the staff report on the second appeal, there
7 are practical and policy reasons to hold non-littoral owners to a higher burden of proof that they
8 are entitled to the use of moorings on Lake Tahoe. Both Nevada and California State Lands
9 agencies do not favor individual non-littoral buoys. AR II:228. Under the Auer standard,
10 TRPA’s interpretation is not “plainly erroneous or inconsistent with the regulation.” 519 U.S. at
11 461. Accordingly, TRPA’s interpretation controls. See S & M Inv. Co. v. Tahoe Regional
12 Planning Agency, 702 F. Supp. 1471, 1472 (E.D. Cal. 1988). There is no remaining issue of
13 material fact, and TRPA is entitled to judgment on this claim.

14 **V. Conclusion**

15 Because defendants have properly requested judicial notice of public records, the motion
16 for judicial notice (ECF No. 21) is GRANTED.

17 Further, for the reasons explained above, IT IS RECOMMENDED that defendants’
18 motion for summary judgment (ECF No. 15) be GRANTED, that judgment be entered in favor of
19 defendants, and that this case be closed.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
22 after being served with these findings and recommendations, any party may file written
23 objections with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a
24 document should be captioned “Objections to Magistrate Judge’s Findings and
25 Recommendations.” Any response to the objections shall be filed with the court and served on all
26 parties within fourteen days after service of the objections. Local Rule 304(d). Failure to file

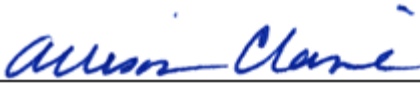
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1 objections within the specified time may waive the right to appeal the District Court's order.
2 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57
3 (9th Cir. 1991).

4 IT IS SO ORDERED.

5 DATED: January 24, 2023

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7 ALLISON CLAIRE
8 UNITED STATES MAGISTRATE JUDGE
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